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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District of Pennsylvania

BRIEF OF FEMINISTS FOR FREE EXPRESSION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE[1]

Feminists for Free Expression ("FFE") is a national organization of women and men who share a commitment to both gender equality and freedom of expression. FFE was founded on the tenet that the right of free speech is a prerequisite to attaining gender equality and cannot be disregarded for fashionable causes without inevitably harming women's rights. FFE is thus dedicated to opposing censorship that, however well-intended, is ultimately counterproductive to the goal of equality for women.

As many of FFE's writer and artist members can attest, feminist expression is inherently controversial and often blamed for social problems ranging from divorce to teenage pregnancy, just as some erotic speech is made the scapegoat for other social ills. Indeed, any written or visual work that deals frankly with women's lives and sexuality is at risk of censorship.[2] In recent years, many feminist artists and writers have learned from first-hand experience that the urge to censor "offensive" material is prevalent in our society,[3] and feminist work is particularly

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[1] Counsel for appellants and appellees have consented to the filing of this brief *amicus curiae*. Their consent letters are on file with the Clerk of the Court.

[2] Works that have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, Maya Angelou's *I Know Why the Caged Bird Sings*, Margaret Atwood's *The Handmaid's Tale*, Judy Blume's *Are You There, God? It's Me, Margaret*, Nancy Garden's *Annie on My Mind*, Leslea Newman's *Heather Has Two Mommies*, and Alice Walker's *The Color Purple*. *See The Most Frequently Banned Books in the 1990s* (visited Feb. 13, 1997) http://www.cs.cmu.edu/People/spok/most-banned.html; Herbert Foerstel, *Banned in the USA*, ch. 4 (1994); Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-6 (Americans for Constitutional Freedom 1991).

[3] *See* Foerstel, *Banned in the U.S.A.* at xiii; Pally, *Sense and Censorship: The Vanity of Bonfires*; Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society — From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

vulnerable to such censorship.[4]

Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality, reproduction, and abuse is critical to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship in all forms. Few forms of censorship, however, are as threatening to women's interests as the Communications Decency Act's restrictions on "indecent" and "offensive" speech on the Internet. The Internet offers unprecedented opportunities for individuals to exchange information and debate ideas, making it the front line in free speech. Indeed, it is the first forum in the "marketplace of ideas" that is so accessible to all as to make Justice Brandeis' answer to false speech — *more* speech[5] — truly work. Ignorance is countered by information, controversies are debated on their merits, and the truth wins out — so long as it is not censored.

FFE views the Internet as key to achieving gender equality, a goal that will be greatly harmed by the Congress's attempted restrictions on Internet communications. FFE therefore has a strong interest in ensuring that the Internet remains free from censorship that is inconsistent with the fundamental free-speech rights that are so crucial to women.

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[4] Karen Finley and Holly Hughes, for example, are feminist playwrights and actresses whose NEA grants were improperly denied on "decency" grounds. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996). Judy Blume's books for adolescents have won wide acclaim, but have also spawned such controversy that the American Library Association calls her "the most censored author in America." Erica Jong's frank treatment of women's sexuality in her best-selling novels has likewise drawn fire, as has Barbara Alper's photography and Ana Ferrer's sculpture.

[5] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there [is] time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

SUMMARY OF ARGUMENT

The Communications Decency Act of 1996 ("CDA") makes it a crime to use computer communications to transmit or display "indecent" or "patently offensive" content in a manner available to minors. 47 U.S.C. § 223(a)(1), (d)(1).[6] Such communications, however, are protected by the First Amendment, so long as they are not obscene. They therefore cannot be prohibited, even to serve compelling interests, except "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down ban on indecent telephone communications because "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends").

The CDA is not carefully tailored or narrowly drawn. Since there is no effective way for most Internet speakers to prevent their speech from reaching minors, *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Penn. 1996); *Shea v. Reno*, 930 F. Supp. 916, 927-28 (S.D.N.Y. 1996), the only way for them to avoid criminal sanctions is to refrain entirely from speech that could be considered "indecent" or "offensive." The CDA would thus effectively ban some speech altogether, since the Internet is often the only forum available to ordinary citizens. As the court below recognized, much of the material potentially subject to the CDA's criminal sanctions has serious literary, artistic, political, or scientific value. Online discussions of AIDS prevention, survivors' stories of incest and rape, photography and art exhibits, and news stories on human-rights violations or sexual harassment are all important to women, yet all contain material that could be considered "indecent" or "patently offensive" even in "context."

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[6] FFE, like the appellees, will cite to the U.S. Code sections where the CDA will be codified, rather than to the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35.

The CDA's broad sweep would actually thwart, rather than serve, the government's asserted interest in furthering the ability of parents and children to take advantage of the Internet's educational opportunities. The CDA would reach a great deal of online information — such as safe-sex instruction or photography exhibits or news articles — that some parents might choose to use with their older children. Instead of allowing parents to make that choice by supervising and screening their children's use of online resources, the CDA would dictate one result for all parents and for all children.

ARGUMENT

I. The CDA would effectively ban valuable speech among adults on a wide array of topics, ranging from sexual harassment to AIDS prevention.

The CDA prohibits "patently offensive" speech in terms so vague and overbroad that even the government and the *amici* supporting it are unable to agree on its scope. The statute makes it a crime to use the Internet to display, in a manner available to minors,

> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

47 U.S.C. § 223(d)(1).[7] Some *amici* contend that this language proscribes only "pornography." Brief of *Amici Curiae* Members of Congress, at 8. Another acknowledges approvingly that it reaches material that has serious value and nonprurient purpose as well. Brief of *Amicus Curiae* Morality in Media, at 9. The

[7] Section 223(d) also prohibits using the Internet to send such material to specific minors, while Section 223(a) prohibits transmitting "obscene or indecent" material to minors. The court below assumed that "indecent" material was the same as Section 223(d)'s "patently offensive" material. *ACLU*, 929 F. Supp. at 850 (Sloviter, C.J.).

government itself takes a third tack, suggesting that serious work would "almost always" fall outside the CDA, and thus that sometimes it would not. Brief for Appellants, at 17, 44; *see* Brief of *Amicus Curiae* The Family Life Project, at 22. If even the CDA's supporters cannot agree on what this language encompasses, how can prosecutors, judges, and juries avoid arbitrary enforcement of this criminal statute? More importantly, how can ordinary citizens avoid prosecution — except, of course, by not speaking?

The CDA would thus chill, if not ban outright, speech that has serious value and nonprurient purpose. As we show below, online discussions of sexual harassment, debates over laws prohibiting pornography, poetry by incest survivors, instruction for AIDS prevention, and even some news stories all contain material about sexual activity that, in context, could be considered patently offensive in some communities. Such speech would arguably fall within the CDA's definition, thus making it a crime to transmit or display it online in a manner available to minors.

The vast majority of Internet speakers have no practical way of preventing minors from accessing their online communications. *ACLU*, 929 F. Supp. at 845; *Shea*, 930 F. Supp. at 927-28. Thus, they can avoid criminal sanctions only by refraining from any "indecent" or "offensive" speech, regardless of its serious value or importance. This Court, however, has long held that the government may not "reduce the adult population . . . to . . . only what is fit for children," even to protect children from indecent speech. *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *accord Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2393 (1996); *Sable Communications*, 492 U.S. at 128; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983). Because the CDA would effectively preclude adults from engaging in speech with serious value, it unconstitutionally infringes the First Amendment rights of Internet users.

A. The CDA effectively bans protected speech among adults.

There is one point on which the parties and the *amici* agree: the Internet is a unique, and uniquely valuable, medium, which opens vast new opportunities for communication to all Americans. This is not a reason, as the government suggests, to impose content-based criminal prohibitions on "indecent" or "offensive" speech in this medium. It is instead a reason why this Court should be particularly reluctant to authorize such interference with "uninhibited, robust, and wide open" speech on the Internet. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Many speakers and listeners would have no practicable way to reach one another without the Internet, where many of them engage in otherwise protected speech that could come within the reach of the CDA. Contrary to the government's suggestion (Brief of Appellant at 28), women seeking to engage in such speech cannot simply go to a nightclub or buy a magazine to find an alternative to participating in frank, open discussions of sexuality or discovering that they are not alone in overcoming the trauma of rape or coming to terms with childhood incest.

Indeed, many Internet users live in small, isolated communities where they simply have no other viable means of gaining access to the kind of valuable but sexually explicit information available on the Internet. Other users would not speak without the anonymity provided by the Internet: victims of incest or rape, for example, or women exploring their sexual orientation, or even women with "embarrassing" questions about sex or reproductive health might not speak at all in forums where their identity was known. *See ACLU*, 929 F. Supp. at 849, ¶ 121 (finding that "[a]nonymity is important to Internet users who seek to access sensitive information").

Finally, there are no alternatives to the Internet's "genderless" environment. Because women may speak online without revealing their gender, they may feel more free to speak candidly and openly about political, cultural, or moral issues involving sex and sexuality without facing social opprobrium. Indeed, a woman

using the Internet may find her speech being taken seriously for the first time — precisely because the audience does not know her gender, and thus does not automatically discount what she says.

For many women, then, the Internet provides a unique opportunity for speech. Without the Internet, these women would have no way to engage in frank discussions of sexual matters and no way to communicate with those who can answer their "embarrassing" questions, who understand their feelings about their sexuality, or who can help them deal with the aftermath of rape or incest. A ban on "indecent" and "offensive" online communications would thus effectively ban such speech altogether.[8]

B. The CDA sweeps so broadly that it could criminalize speech with serious value, reaching discussions as diverse as politics, sexual narassment, AIDS prevention, and child abuse.

The Internet is the first forum where ordinary women can speak to national, or even global, audiences to debate the important issues of the day. Discussions of topics important to women, however, will be chilled, if not banned outright, by the CDA's criminal sanctions for "patently offensive" speech. On its face, at least, the CDA appears to ban all "indecent" or "patently offensive" speech, including that with serious value. *See ACLU*, 929 F. Supp. at 855 (Sloviter, C.J.) (Congress did not exclude material with serious value from the CDA.); *id.* at 863 (Buckwalter, J.) (The CDA's prohibitions must reach works of serious value, as "indecency has *not* been defined to exclude

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[8] FFE does not in any way suggest that the constitutionality of the CDA turns on the existence or non-existence of alternative forums for indecent speech. Even if there were adequate alternatives to the Internet, this would not save the CDA, as a content-based criminal law suppressing speech. The uniqueness of the Internet and the lack of alternatives for many who use it simply underscore the magnitude of the CDA's censorial effect.

[them]."). In any event, because of the inherent uncertainty of the scope of what is banned, many Internet users will be silent rather than risk prosecution, and communications will be chilled.

The following examples are just a few of the many online communications about sexually explicitly topics that could be considered by some prosecutors, judges, or juries to be "indecent" or "patently offensive" even though they have serious value or nonprurient purposes. As the examples make clear, much of this speech is of vital importance to women and even to older teenage girls.

1. *The CDA could prohibit speech that saves lives.*

The district court found that groups such as appellee Critical Path maintain web sites that display explicit safe-sex instructions, written in street language to reach a young audience. *ACLU*, 929 F. Supp. at 844. Indeed, there are several hundred thousand discussion groups and postings on the Internet regarding safe sex, many of which include explicit descriptions of sexual activities designed to prevent the spread of AIDS and other sexually transmitted diseases.[9] They often use vulgar street language "to

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[9] A search for the words "safe sex" turned up 500,000 postings on the Web, using the Netscape Navigator and the AltaVista search engine. *See, e.g.*, Critical Path AIDS Project, Inc., *Critical Path AIDS Project* (visited Feb. 12, 1997) http://www.critpath.org; *The Safer Sex Page* (visited Feb. 12, 1997) http://www.safersex.org (including a forum for questions and discussions); *A Girl's Guide to Condoms* (visited Feb. 13, 1997) gopher://eng.hss.cmu.edu/00ftp%3aEnglish.Seven%3aFeminism%3aGirl%27s%20Guideto%20Condums; The Coalition for Positive Sexuality, *Just Say Yes* (visited Feb. 12, 1997) http://www.positive.org/cps/jsy/jsy.html; Planned Parenthood Federation of America, *Sex — Safer and Satisfying* (visited Feb. 12, 1997) http://www.ppfa.org/ppfa/safesex1.html; The Society for Human Sexuality, *Hot Sex, Safely: A Guide to Safer Sex Techniques* (visited Feb. 13, 1997) http://weber.u.washington.edu/%7Esfpse/safesex.html. A number of these sites have links to discussion areas. *See, e.g.*, Critical Path AIDS Project, Inc., *Critical Path AIDS Project* (visited Feb. 12, 1997) http://www.critpath.org; *The Safer Sex Page* (visited Feb. 12, 1997) http://www.safersex.org.

attract a teen audience and deliver their message in an engaging and coherent way." *ACLU*, 929 F. Supp. at 871 (Dalzell, J.).

These safe-sex materials are vitally important to women. And, as Chief Judge Sloviter noted, they could be "critically important for certain older minors, [as] one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20." *ACLU*, 929 F. Supp. at 853 (Sloviter, C.J.). Access to these materials could save lives. That access, however, could be denied under the CDA, for, as the district court found, these materials could be considered patently offensive in many communities, even in context. *Id.*

The CDA could also reach other essential health information on the Internet, such as illustrated instructions on how to perform a breast-cancer self-examination or educational materials on other sexually transmitted diseases. There are thousands of sites discussing breast cancer, for instance.[10] Once again, these materials could save lives, and once again, many of them are explicit enough that, even in context, they could be considered patently offensive in some communities.

2. *The CDA could make it a crime for victims to discuss their experiences and seek help online.*

There are numerous mailing lists, newsgroups, chat rooms, and

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[10] *See, e.g.*, American Cancer Society, *Breast Self-Examination* (visited Feb. 12, 1997) http://www.ca.cancer.org/services/breast/bse.html (illustrated instructions for self-exams); Memorial Sloane-Kettering Cancer Center, *The Breast Examination Center of Harlem* (visited Feb. 12, 1997) http://www.mskcc.org/document/pedbse.htm (same); Medical Interactive Applications, Inc., *Breast Self-examinations* (visited Feb. 12, 1997) http://www.immediate.com/media/breast.html (same); Planned Parenthood Federation of America., *Breast Cancer Awareness* (visited Feb. 12, 1997) http://www.ppfa.org/ppfa/breast_cancer_bse.html (same).

web sites dedicated to helping victims of rape, incest, and sexual assault come to terms with that experience by giving them the opportunity to tell their stories and learn that they are not alone.[11] Sometimes, of course, a victim may be unable to convey her outrage and her injury without graphic words and descriptions. Such descriptions, however, could be considered patently offensive by some people even in context. *See, e.g.*, *Pacific & Southern Co., Notice of Apparent Liability*, 6 F.C.C.R. 3689 (1990) (finding broadcast of rape victim's graphic story indecent). Even the victim's use of expletives to express her anger could fall within the CDA. *ACLU*, 929 F. Supp. at 872 (Dalzell, J.) (noting that one government expert testified that he would be offended by the use of expletives); *id.* at 864 (Buckwalter, J.) (noting that government's expert opined that the CDA would reach any use of the "seven dirty words").

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[11] *See, e.g.*, Veritas Programming, *The Truth in Any Memory* (visited Feb. 12, 1997) http://www.sover.net/~schwcof/memory2.html (inviting survivors to post their stories because "[r]eading the stories of fellow survivors . . . can bring a measure of relief"); Carleen E. Ellis, *Butterflies: The Magazine for Survivors of Incest, Sexual Abuse, and Ritual Abuse Who Have Reclaimed Their Lives* (visited Feb. 12, 1997) http://drwnet.com/bfly (including discussion-group mailing list "for those who need to know they're not alone"); TimePassages, *Voices of Kind Discussion Forum* (visited Feb. 12, 1997) http://www.timepassages.com/VOK/0VOK.htm (for victims of incest); *The Survivor's Page* (visited Feb. 12, 1997) http://www.stardate.bc.ca/survivors (posting letters, poetry, and writings of victims of sexual abuse and rape); *Survivors on the Net* (visited Feb. 12, 1997) http://www.mistral.co.uk/survivors/survive.htm (writings by survivors); Anne M. Cox, *Write to Tell* (visited Feb. 12, 1997) http://www.geocities.com/CapitolHill/3581/tell.html (providing a creative outlet for sexual abuse survivors to exchange thoughts and writings); Rape, Abuse, and Incest National Network (visited Feb. 12, 1997) http://www.feminist.com/rainn.html; ASAR(C) (visited Feb. 12, 1997) http://wchat.on.ca/public/asarc/index.html (providing chatline for victims of sexual abuse and assault); Stop The Violence, *Stop Violence Against Women* (visited Feb. 12, 1997) http://www.zoom.com/personal/staci/violence.htm (incest and child abuse survivors' resource).

Even if such discussions were not criminally prosecuted, the CDA would chill them. Women using chat rooms, email, and bulletin boards who are unfamiliar with the legal contours of "indecency" may well be silent rather than risk prosecution; after all, it is difficult enough to talk of these experiences without worrying about being too explicit. *ACLU*, 929 F. Supp. at 872 (Dalzell, J.) (noting that participants in online discussions of rape "could legitimately fear prosecution" under the CDA). Women cannot be expected, and constitutionally cannot be required, to sanitize their speech about such personally traumatic events.

3. *The CDA could prohibit literary and artistic expression.*

Many writers, poets, photographers, and artists display their work on the Internet; other artists' work may be displayed through online magazines, museum guides, or libraries. *See ACLU*, 929 F. Supp. at 842-43, ¶¶ 74-75; *id.* at 853 (Sloviter, C.J.); *id.* at 844, ¶ 85 (finding that images of Edward Weston's and Robert Mapplethorpe's nude photography were available through UCR/California Museum of Photography's web site).[12] As evidenced by the continuing censorship of books or plays exploring women's sexuality, and by the protests over photography or museum exhibits, some of this work may be considered "patently offensive" in certain communities, even while others laud it with praise and awards.[13] *See, e.g.*, *ACLU*,

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[12] The photographs at issue are posted at *Weston-Mapplethorpe Exhibition* (visited Feb. 12, 1997) http://cmpl.ucr.edu/Exhibitions/w_m/wm2.html.

[13] The following examples of original work posted on the Internet could all be considered patently offensive in some communities. Danny Conant, *Danny Conant Photography* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Danny/dscartnet.html (exhibiting original photography, including nudes); Andrea Dworkin, *Intercourse* (visited Feb. 12, 1997) http://www.igc.org/Womensnet/dworkin/Intercoursel.htm (excerpt from book); Carleen E. Ellis, *Butterflies: Thoughts on Being an Incest Survivor* (visited Feb. 12, 1997) http://www.drwnet.com/bfly/bflysurv.html (posting excerpt from her book *Pieces of Me*); The Mark Lynch Gallery (visited Feb. 12, 1997) http://www.io.com/~

929 F. Supp. at 853 (Sloviter, C.J.) (suggesting that the award-winning play *Angels in America* may be considered patently offensive in some communities). The CDA could make it a crime to display such materials on the Internet, thus chilling the online publication of literary and artistic work.

4. *The CDA could even reach discussions of news and politics.*

Numerous news stories and political discussions important to women involve sexually explicit speech that could be considered patently offensive by some. Online articles and discussions of female genital mutilation, which recently made headlines when it was reported that immigrants were continuing the practice here in the United States, are, as Chief Judge Sloviter recognized, graphic enough that they could be considered patently offensive even in context. *ACLU*, 929 F. Supp. at 853 (Sloviter, C.J.).[14] Reports of human-rights violations, including forced prostitution,

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photoguy/history.html (exhibiting original photography, including male nudes); Mary Anne Mohanraj, *Mary Anne's Home Page* (visited Feb. 12, 1997) http://www.iam.com/maryanne/home.html (posting original fiction, poetry, and erotica); R.J. O'Connor, *rj o'connor's Studio* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Rjocon/rjocon.html (posting original drawings, paintings, and photography, including nudes); *Sarabel's Studio* (visited Feb. 12, 1997) http://www.art.net/Studios/Visual/Sarabel/sarabel.html (exhibiting, *inter alia*, Rembrandt's *Andromeda*); Suzanne Stutman, *Broken Feather: A Journey to Healing* (visited Feb. 13, 1997) http:/ /www.bookmasters.com/marktplc/readroom/rr00158.htm#PainTwo (posting poems and excerpts from her book on surviving sexual abuse).

[14] *See, e.g.*, Fran Hosken, *Female Genital Mutilation* (visited Feb. 12, 1997) http://www.feminist.com/fgm.htm; Marcia L. Mason, *Atrocities Against Women: Female Genital Mutilation* (visited Feb. 19, 1997) http://www.worldcitizen.org/issues/junjul96/fgm.html.

rape, and sexual mutilation, can be just as graphic.[15] This information is vital to those concerned with women's rights, and human rights generally, but it could be banned by the CDA.

Online discussions of the First Amendment freedoms so crucial to women would also be at risk. For example, an academic discussion of the extent to which the government may constitutionally regulate pornography might describe pornographic material in graphic detail to illustrate the asserted harm.[16] Or a debate on censorship might include the material censored.[17] Indeed, some material is posted on the Internet precisely *because* it has been censored by certain communities. Plaintiff Justice on Campus, for example, maintains a web site and an online mailing list for discussing and posting material that has been censored, particularly by schools.[18] *Banned Books On-Line* provides the entire text of books that have been suppressed or censored for

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[15] *See Human Rights Watch* (visited Feb. 13, 1997) gopher://gopher.igc.apc.org:5000/11/int/hrw (posting reports on human-rights violations); *Violence Against Tibetan Women: Torture and Sexual Abuse of Women Activists and Those in Custody* (visited Feb. 12, 1997) http://www.grannyg.bc.ca/tibet/women4_3.htm (reports of torture and sexual abuse in Tibet).

[16] *See, e.g.*, Andrea Dworkin, *Letters From A War Zone* (visited Feb. 12, 1997) http://www.igc.apc.org/Womensnet/dworkin/WarZoneAListing.html; Andrea Dworkin,*The Root Cause*, Chapter 9 of *Our Blood: Prophecies and Discourses on Sexual Politics* (visited Feb. 12, 1997) http://www.igc.apc.org/Womensnet/dworkin/OurBloodIV.html.

[17] *See, e.g.*, Committee for Artists' Rights Archive, *Robert Mapplethorpe Traveling Exhibition* (visited Feb. 12, 1997) http://fileroom.aaup.uic.edu/FileRoom/documents/Cases/337mapplethorpe.html (discussing the arrest and indictment of Cincinnati's museum director for exhibiting Robert Mapplethorpe's critically acclaimed photography and displaying one of the photographs labeled "obscene").

[18] *The Justice On Campus Project* (visited Feb. 12, 1997) http://joc.mit.edu.

"indecency," such as *Candide*, *Ulysses*, and *Fanny Hill*.[19] Arguably, these and other censored works could not be displayed or discussed online without potentially running afoul of the CDA, since some communities have already judged them to be patently offensive.

Even the complaints in sexual harassment suits like *Clinton v. Jones* or court opinions in First Amendment cases like *New York v. P.J. Video*, 415 U.S. 868 (1986) could be prohibited under the CDA. The allegations in the Jones suit, for example, describe sexual activities and organs in terms that might be considered patently offensive in some communities,[20] while the opinion of this Court in *P.J. Video* includes an appendix with affidavits detailing the sex scenes in a movie seized for obscenity, 415 U.S. at 883-84. And news articles and commentary discussing the cases may well contain descriptions at least as graphic as the complaints and opinions themselves.[21]

In sum, the CDA would chill a substantial amount of online material that has serious literary, artistic, political, or scientific value. Much of this material is of great importance to women and to feminists, but much of it could be considered patently offensive, even in context, in some communities. Effectively banning all of this material from the Internet, in an attempt to shield children from "offensive" speech, is a classic case of unconstitutional overreaching.

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[19] *Banned Books On-Line* (visited Feb. 12, 1997) http://www.cs.cmu.edu/People/spok/banned-books.html.

[20] *See* Compl. ¶¶ 21-22, 24, *Jones v. Clinton*, No. LR-C-94-290 (visited Feb. 12, 1997), *available at, e.g.*, http://www-swiss.as.mit.edu/zoo/clinton-full-complaint.text.

[21] *See, e.g.*, Court TV Library, *Paula Jones' Case Against Clinton* (visited Feb. 12, 1997) http://www.courttv.com/library/government/jones/staylor.htm (posting Stuart Taylor's November, 1996, article from *The American Lawyer*).

II. The CDA's broad sweep would actually thwart, rather than serve, the government's newly asserted interest in furthering the ability of all Americans to take advantage of the Internet.

The government asserts that the CDA may be justified as "furthering the First Amendment interest of all Americans to use what has become an unparalleled educational resource." Brief for Appellant, at 14. But even if this interest is compelling, the government has not shown that the CDA would further it. In fact, it is far more likely that the CDA would severely hamper the First Amendment right of all Americans to engage in speech on the Internet.

Women have a particular interest in keeping the Internet's educational resources open to all users, for women depend on exchanging information and debating ideas in their quest for gender equality. Women also want, as parents, to use the Internet as an educational tool for their children. But different parents may make different choices as to how to raise and educate their children. One parent, for example, may encourage her child to read *Catcher in the Rye*, while another forbids it altogether; one parent may think that *Angels in America* is too adult for her child, while another may find it highly appropriate. It is up to the parent, not the government, to make these decisions. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding liberty of parents to direct the upbringing and education of their children); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

A parent's decision to use the Internet as an educational tool for her child is no different than her decision to allow the child to use the public library. Both the library and the Internet contain wonderful educational materials for children; both also contain materials that some parents might find objectionable. It is the parent who should choose whether to use the library or the Internet at all, and the parent who should decide whether, and how, to limit her child's access to the materials there. The CDA, however, would take away a parent's choice to give her child

access to the full scope of educational material on the Internet.

This Court has upheld laws prohibiting the sale of sexually explicit magazines to children, but it has never held that parents cannot show such material to their children if they so choose. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Indeed, the *Ginsberg* Court specifically noted that the law at issue there did not prohibit parents from buying the magazines for their children if they so desired. *Id.* The CDA would rob parents of such choice by effectively banning sexually explicit material from the Internet. Some parents, for example, might wish to teach their children about sexuality and safe sex by using the materials available online. Under the chill of the CDA, however, those materials might no longer be available. In any event, a parent might fear using the Internet to display such materials for her child even if they were available, for the CDA could be read to make it a crime for a parent to allow her child to view "indecent" or "offensive" materials online. *See, e.g.*, 47 U.S.C. §§ 223(a)(2), (d)(2). Far from furthering the rights of parents and children to receive information and acquire knowledge, the CDA would severely impair those rights.

The best way to further the right of all Americans to receive and acquire knowledge is to encourage, not restrain, the free exchange of ideas that is the hallmark of the Internet. This exchange is sometimes coarse, occasionally vulgar, and certainly rough around the edges, but that is what one would expect when every person has a voice that can be heard. *ACLU*, 929 F. Supp. at 882 (Dalzell, J.). If there are words, or information, or ideas that parents do not wish to expose their children to, they can supervise their children's access to the Internet or use screening software. *See id.* at 839-42 (describing screening software). Neither option restricts the free speech rights of others, and both are effective at shielding children. In fact, parents will have to use supervision or screening even under the CDA to prevent children from accessing materials posted by the 40% of Internet users who are outside the United States, since the CDA does not, of course, reach such users. Supervision and screening also allow parents the option of shielding their children from other material

that they might object to, including information about guns, drugs, violent rock lyrics, even "communist ideas" or alternative religions. *Id.* at 839-40, ¶¶ 55, 57. Both options give parents control over what speech their children hear without restricting what others say.

When less restrictive means such as these exist to protect children while furthering the rights of all Americans to receive and acquire knowledge, Congress is not free to impose more restrictive laws that infringe the First Amendment. The rights of American Internet users to speak freely should be affirmed, and the decision of how to raise a child should be left where this Court has said it belongs: with the individual parents.

CONCLUSION

The decision of the three-judge court below should be affirmed.

Respectfully submitted,

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